In the Supreme Court of the United States.

OCTOBER TERM, 1921.

SANTA FE PACIFIC RAILROAD COMPANY, *Appellant,*
v.
ALBERT B. FALL, *Secretary of the Interior.*
No. 108.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF FOR APPELLEE.

STATEMENT.

The appeal in this case (R. 32) is from a decree of the Court of Appeals of the District of Columbia (R. 32) which affirmed a decree of the Supreme Court of the District (R. 23) dismissing a bill brought by the Santa Fe Pacific Railroad Company against the Secretary of the Interior to enjoin him from enforcing and to compel him to set aside and vacate an order entered by him for the cancellation of a filing made by the company for certain lands in the State of New Mexico sought to be acquired under the provisions of the Act of April 28, 1904, c. 1810,

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33 Stat. 556. Opinion of the Court of Appeals, R. 29–32; 267 Fed. 653.

THE FACTS.

Section 1 of the Act of April 28, 1904, *supra*, which is the portion of the act material here, is as follows:

> That the Atlantic and Pacific Railroad Company, its successors in interest and its or their assigns, may, when requested by the Secretary of the Interior so to do, relinquish or deed, as may be proper, to the United States any section or sections of its or their lands in the Territory of New Mexico the title to which was derived by said railroad company through the Act of Congress of July twenty-seventh, eighteen hundred and sixty-six, in aid of the construction of said railroad, any portion of which section is and has been occupied by any settler or settlers as a home or homestead by themselves or their predecessors in interest for a period of not less than twenty-five years next before the passage of this Act, and shall then be entitled to select in lieu thereof, and to have patented other sections of vacant public land of equal quality in said Territory, as may be agreed upon with the Secretary of the Interior.

The purpose of the act was to provide for the relief of settlers on lands within the grant to the Atlantic and Pacific Railroad Company whose rights were inferior to those of the company and who otherwise might lose their homes. These claims were

called "small holding claims" and had long existed, being recognized and provided for by sections 16 and 17 of the Act of March 3, 1891, c. 539, 26 Stat. 854, 861, 862, as amended by the Act of February 21, 1893, c. 149, 27 Stat. 470, 471. See Circular of August 2, 1904, 33 L. D. 156; Santa Fe Pacific R. R. Co., 39 L. D. 135.

Proceeding under this act the Santa Fe Pacific Railroad Company, as the successor of the Atlantic and Pacific Railroad Company, at the request of the Secretary of the Interior, relinquished to the United States certain lands, and on May 1, 1911, applied for other described lands in lieu of those so relinquished. Both the relinquished (base) lands and the selected lands were coal in character and were alleged by the company to be *equal in quality*, a determinative factor under the act of 1904.

A protest against the allowance of the selection was filed by one Thomas Leaden, who alleged that the selected lands were of greater value than the base lands and that the approval of the selection would operate as a monopoly of the coal lands in the vicinity of Gallup, New Mexico. R. 5 and 7.

Upon consideration of the matter, the Commissioner of the General Land Office rejected the selection because the base and selected lands were not of equal quality. Apparently this action was predicated upon a report of an examination of the respective tracts made by a mineral inspector of the General Land Office, who stated that the lands selected were of greater value than the land relinquished, although

as far as the topography of the lands was concerned, they were apparently of equal quality.

Upon appeal by the company, the First Assistant Secretary, by a decision dated April 30, 1914, reversed the Commissioner, saying (R. 6):

> The value of lands is an element which may be taken into consideration in determining their quality. It appears that both the base and selected tracts have been classified as coal lands at the minimum price, which is equivalent to a finding that they are coal lands of equal quality. This classification by the Government should be considered as determinant in the absence of a pertinent and competent showing to the contrary.
>
> The conditions mentioned in the special agent's report, it must be assumed, were all considered and passed upon by the Geological Survey in making the classification of these lands, and the facts therein set forth do not constitute such a showing as would warrant the department in rejecting this selection. As the records of the Department show that the lands selected and the base lands are of equal quality, no good reason appears for rejecting the railroad's selection.

However, before this decision became effective the case was recalled and action thereon suspended and, upon further consideration, the decision was set aside and vacated and the selection rejected by a decision dated October 26, 1916. In this decision it was stated (R. 8):

> Since the date of the former departmental decision the lands have been reclassified by the Geological Survey and under date of August 7, 1916, 240 acres of the base lands were classified as coal lands and priced $20 per acre, and 240 acres classified as non-coal lands. On the same day all of the selected lands were classified as coal lands and priced at figures ranging from $62 to $83 per acre, thus showing the superior quality of the lands selected over the base lands. This verifies the report of the mineral inspector.
>
> Under the terms of the act only such lands as may be agreed upon with the Secretary as being equal in quality with the base lands may be selected. It being satisfactorily shown that the selected lands are superior in quality to the base lands, the Department is unable to approve this selection and it is therefore rejected. Accordingly, the former decision is hereby recalled and vacated.

A motion for rehearing was then filed by the railroad company (R. 8), supported by a rather elaborate brief. R. 9–18. This motion was denied and in the opinion of the First Assistant Secretary it was said (R. 21):

> It is further assigned as error that the Department construed the word "quality" as found in the act of April 28, 1904, as the equivalent of "value." But the Department has not so construed the act. The price fixed upon the respective tracts, by the Geological Survey in its classification, was mentioned but only to indicate the difference in quality as

found by the mineral experts in that office, and as corroborative of the finding of the mineral inspector in the field. The Department has thus availed itself of the most authentic information known to it in reaching a conclusion respecting the quality of the lands.

Thereafter, the railroad company filed its bill praying for injunction (R 1–5) to restrain the Secretary from enforcing his order of rejection and cancellation, and also praying a mandatory injunction to compel the setting aside of said order.

A motion to dismiss the bill was filed by the defendant. This motion averred that the bill did not exhibit a cause of action entitling the company to the relief sought or to any relief in equity; it further briefly narrated the history of the matter and asserted that the action complained of was taken by the defendant in the exercise of judgment and discretion in a matter coming within his exclusive jurisdiction. R. 21, 22. This motion was sustained and the bill dismissed.

PROPOSITIONS.

I. The court is without jurisdiction to hear this appeal.

II. The decision of the Secretary is impregnable to mandatory injunction, since it was made in the exercise of judgment and discretion.

III. The decision complained of was correct, and consistent with a proper construction of the statute involved.

I.

The court is without jurisdiction to hear this appeal.

Appellant founds its right to a review of the decree below upon the fifth and sixth paragraphs of section 250 of the Judicial Code. Those paragraphs provide for appeals or writs of error:

> Fifth. In cases in which the validity of any authority exercised under the United States, or the existence or scope of any power or duty of an officer of the United States is drawn in question.
>
> Sixth. In cases in which the construction of any law of the United States is drawn in question by the defendant.

We contend that the case here presented does not raise any question such as to bring it within either of these paragraphs of the Code.

As to the fifth paragraph, appellant's petition for appeal (R. 32) asserts that the scope of the power of the Secretary of the Interior and also his duty with respect to this selection is drawn in question.

Proceeding to consider this question, we discover that this claim is unfounded. The company tendered to the Land Department a selection in lieu of the lands reconveyed by it. Concededly, the Land Department was invested with jurisdiction to entertain and pass upon that selection. It was particularly so specified in the act of 1904, under which appellant claims to be entitled to the land in controversy, The appellant by tendering the selection admitted the jurisdiction of the Land Department

or the Secretary to pass upon the selection and to determine whether it should be approved and the land applied for patented to it. In other words, the *power* of the Secretary was admitted and so was the scope thereof for if the Secretary had power to pass upon the selection and determine that the land should be patented, he manifestly had the power to reject the selection and decline to patent the land. The concession of the power to approve necessarily concedes the power to reject in so far as right to an appeal under section 250 is concerned.

Again, when appellant tendered its selection it not only invoked the power of the Secretary but also made it his *duty* to pass upon the selection. To say now that the suit at bar challenges the scope of the power and duty of the Secretary is to contend against the very things which by its act the appellant conceded when it initiated the proceedings in the Land Department which it hoped would result in the patenting to it of the land desired.

In reality, the complaint of appellant is not directed against the scope or existence of the power or duty of the Secretary of the Interior but against the result of the exercise of an admitted power and duty. Its grievance is not that the Secretary undertook to decide the matter but because he rendered a decision which was not pleasing to the appellant. But the assertion that the statute was misconstrued, or that under the facts the Secretary should have reached a

different conclusion, would not draw in question the scope or extent of a power or duty.

We consider our view on this point amply supported by the decisions of this court in the following cases: *Taylor* v. *Taft*, 203 U. S. 461, 464; *Champion Lbr. Co.* v. *Fisher*, 227 U. S. 445, 451; *Shaw* v. *Payne*, 254 U. S. 609; *Sykes* v. *Payne*, 254 U. S. 618.

We think it equally clear that the case does not come within the sixth paragraph of section 250.

Appellant states that the construction of the Act of April 28, 1904, is drawn in question by the defendant who asserts that "under the terms of the Act only such lands as may be agreed upon with the Secretary as being equal in quality with the base lands may be selected." Petition for appeal, R. 33.

We do not find the quoted language in the motion to dismiss, which was the only pleading filed by defendant. R. 21, 22. A careful scrutiny of the motion to dismiss fails to disclose any basis for the assertion that the defendant drew in question the construction of any law of the United States.

What was set up in the motion was a brief recitation of the proceedings had in the case in the Land Department. After relating the tendering of the selection, its rejection by the Land Office, the reversal of that action by the Secretary, the suspension of action thereon and the reconsideration of the case, it was said that, discharging the duty imposed by the Act of April 28, 1904, the Secretary found and determined the base and selected lands were not of equal quality and therefore not subject to ex-

change and therefore held the selection for cancellation; that "under the terms of the statute the defendant is constituted the sole and exclusive tribunal to determine whether or not lands offered in exchange are of equal quality with lands selected"; and that the determination thereof involves judgment and discretion, not controllable by the courts.

Certainly no issue was raised or tendered as to the construction of the statute; the court is not asked to approve the Secretary's construction or to construe the statute. The whole tenor and intent of the motion is to make the point that the matter in controversy is one decided by the Secretary in the exercise of judgment and discretion in a matter coming within his undoubted jurisdiction.

We think it to be obvious that the case does not come within the sixth paragraph of section 250 of the Judicial Code.

It follows, therefore, that the appeal should be dismissed for want of jurisdiction.

II.

The decision of the Secretary is impregnable to mandatory injunction, since it was made in the exercise of judgment and discretion.

When the selection covering the lands involved herein was presented to the Land Department it became necessary for it to determine whether it could properly be allowed. Involved in that determination was the consideration of the terms of the statute under which the selection was made. The Secretary

construed the law which provided for the selection of land of *equal quality* with those relinquished by the applicant as making the question of value one of the factors proper to weigh in reaching a conclusion as to whether the respective lands were of equal quality.

Now, viewing the case in the aspect most unfavorable to the Secretary, it seems to us plain that his conclusion was a *permissible* one and not so clearly at variance with the terms of the statute as to make manifest that it was a misconstruction.

Under such circumstances, in a proceeding such as this where mandatory injunction is sought, the law is well settled that where an executive officer reaches a conclusion in the exercise of judgment and discretion in a matter within his jurisdiction, his decision will not be interfered with nor controlled by the courts. The test is not whether the decision was correct but whether it was the result of the exercise of judgment and discretion. The courts will not substitute their view for that of the executive officer nor coerce his judgment. They are not constituted as appellate tribunals to hear appeals from the rulings of such officers. *Ness* v. *Fisher*, 223 U. S. 683; *Louisiana* v. *McAdoo*, 234 U. S. 627; *Alaska Smokeless Coal Co.* v. *Lane*, 250 U. S. 549.

In *Ness* v. *Fisher, supra*, this court had a case of this character, and it was said (p. 691):

> So, at the outset we are confronted with the question, not whether the decision of the Secretary was right or wrong, but whether a decision of that officer, made in the discharge

> of a duty imposed by law and involving the exercise of judgment and discretion, may be reviewed by mandamus and he be compelled to retract it, and to give effect to another not his own and not having his approval. The question is not new, but has been often considered by this court and uniformly answered in the negative.

As was said by Mr. Justice McKenna in *Alaska Smokeless Coal Co., supra* (p. 555):

> Where there is discretion, * * * even though its conclusion be disputable, it is impregnable to mandamus.

In the case of *Hall* v. *Payne*, 254 U. S. 343, this court was asked to declare erroneous the construction given an act of Congress by the Secretary of the Interior. It was said (p. 347):

> He [the Secretary] could not administer or apply the Act without construing it, and its construction involved the exercise of judgment and discretion. The view for which the relator contends was not so obviously and certainly right as to make it plainly the duty of the Secretary to give effect to it. The relator, therefore, is not entitled to a writ of mandamus.

III.

The decision complained of was correct, and consistent with a proper construction of the statute involved.

In the consideration of the application to select tendered by the appellant, the Secretary of the Interior was confronted with the terms of the Act of

April 28, 1904, which provided that there might be selected in lieu of that relinquished "other sections of vacant public land *of equal quality* * * *, *as may be agreed upon with the Secretary of the Interior.*" (Italics ours.)

Now the lands relinquished were coal lands which had been classified by the Geological Survey at $20.00 per acre. Those sought to be selected were also coal lands which at first had been classified by the Survey at the same figure, but which later, and after the selection had been tendered, were valued at from $62.00 to $83.00 per acre.

The Secretary took the view that the element of value was an essential factor within the purview and intent of the statute. We think that such a conclusion was the logical one, for it cannot be supposed that Congress intended to bestow any additional benefit upon the railroad company or to do more than make it certain that it would not lose by the exchange. Could it reasonably be supposed that Congress meant that lands of inferior kind could be relinquished and other land of superior kind acquired in exchange? Such an interpretation would totally ignore the word "equal" in the statute. It is *land of equal quality to that relinquished* which is to be selected. The interpretation given to "equal quality" by the Secretary is consistent with its usually understood meaning. Suppose one offers to exchange with another silk or cloth of equal quality. That ordinarily would be understood as equal in value, for valuation

is merely the common way of expressing relative quality.

It is asserted by appellant that the question whether the lands involved in the exchange contain coal should be eliminated from consideration. This is predicated upon the theory that as the grant to the Atlantic and Pacific Railroad did not except as mineral, lands containing coal or iron, the interpretation of the act of April 28, 1904, should be *in pari materia* with the granting act and lands containing such deposits be treated as agricultural in character.

We see no sound basis for such a distinction. There is nothing in the 1904 act which affords any ground for it, and, in the absence of something specific, an intent to trade mineral lands for non-mineral lands ought not to be assumed. As the Secretary in his decision on the motion for rehearing well said (R. 20):

> If this contention were conceded, the most valuable coal land could be taken in exchange for plain agricultural or grazing land. The terms and conditions for allowance of such selections are set forth in the said act of April 28, 1904, and the Department is not at liberty to ignore any of the restrictions stated therein. It is clear that the only authority for such exchange is to be found in the latter act. Its terms must govern and the granting act may not be invoked to change the terms of the later exchange act. It can not be that tracts wholly dissimilar and greatly superior in quality to the

> base lands may be taken in exchange, for the act specifically limits the right of selection to lands of "equal quality" with the lands reconveyed and there is no justification for holding that this expression is without meaning or effect.

It is further contended that the known conditions existing at the time when the selection was tendered are decisive; that as the selected lands were then classified at the same figure as the base lands were, the terms of the act are fully met, and subsequent developments or later acquired data can not be considered.

But the act clearly contemplates an inquiry by the Secretary as to the respective qualities of the lands. He is not limited to any particular time when he shall make his investigation. There is a broad discretion vested in him, for it is provided that the company may select and have patented to it "other sections of vacant public land of equal quality * * *, *as may be agreed* upon with the Secretary of the Interior."

In the face of such a provision, it can hardly be seriously said that before the Secretary assents to the exchange, rights become vested.

We are not contending that when there is no question that the lands are equal in quality the Secretary may arbitrarily refuse to assent to a selection, after the company has relinquished its lands. But we do say that he is not compelled to ignore such information as may come to him as to the quality of

the lands, simply because it was not available when the selection was tendered.

CONCLUSION.

The decree of the Court of Appeals was correct and should be affirmed.

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Attorney.

NOVEMBER, 1921.

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